CASE NOTES

THE QUEEN v. THE DISTRICT COURT OF THE METROPOLITAN DISTRICT HOLDEN AT SYDNEY AND OTHERS; EX PARTE WHITE.[1]

Constitutional law—Prohibition and certiorari—High Court jurisdiction—Jurisdictional error and error of law—National Service Act 1951-1965 (Cth)—'Conscientious belief'.

Section 29A of the National Service Act 1951-1965 (Cth) provides:

> (1.) A person whose conscientious beliefs do not allow him to engage in any form of military service is, so long as he holds those beliefs, exempt from liability to render service under this Act.
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> (2.) A person whose conscientious beliefs do not allow him to engage in military duties of a combatant nature but allow him to engage in military duties of a non-combatant nature, shall not, so long as he holds those beliefs, be required to engage in duties of a combatant nature.

Section 29B (2.) provides:

> Where a question arises whether a person is, by virtue of sub-section (1.) of the last preceding section, exempt from liability to render service under this Act, the court by which the question is heard may, if it is satisfied that the person is not so exempt but that the person is a person to whom sub-section (2.) of that section applies, decide accordingly.

A stipendiary magistrate found that the applicant, White, was not totally exempt under section 29A (1.), but exercising the discretion given to him by section 29B (2.) he ordered that the applicant be required to undertake non-combatant duties only. On appeal, the District Court affirmed this order.

The present case came before the High Court as an application by White for *certiorari* to quash the decision of the District Court, or alternatively for prohibition to the District Court, the presiding judge, the Minister of State for Labour and National Service and the Commonwealth of Australia to prevent the execution of the order. The application for *certiorari* was made on the ground of an error of law on the face of the record of the District Court. On the application for prohibition it was argued that a correct finding that the applicant was not exempt under section 29A (1.) was an essential prerequisite to the Court's having jurisdiction to make an order under section 29B (2.). Hence, it was argued, as this decision had not been correctly made, the District Court had acted without jurisdiction in making the order it did. The High Court held that neither jurisdictional error nor error of law had been established.

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[1] (1966) 40 A.L.J.R. 337. High Court of Australia; Barwick C.J., McTiernan, Taylor, Menzies and Windeyer JJ.

Jurisdiction to issue the writs

For the purposes of the case, the Court assumed it could grant the writs being sought, but it expressed reservations as to the correctness of this assumption. The original jurisdiction of the High Court to issue *certiorari* would rest on section 30 of the Judiciary Act 1903-1965 (Cth)[2] and, had the Court decided the point, it probably would have held that the present case did not come within this section. The phrase ' matters arising under this Constitution ' has been the subject of judicial interpretation in a number of cases.[3] The fact that the interpretation of federal legislation is in issue is clearly insufficient to give jurisdiction.[4]

The Court also doubted whether it ought to issue prohibition in this case, but again without giving its reasons. If the other members of the Court did not agree with the finding of Windeyer J. that the Commonwealth was a proper party to the proceedings[5] then the Court would no longer have had jurisdiction under section 76 (v.) of the Constitution,[6] for in *The King v. Murray and Cormie*; *Ex parte The Commonwealth*[7] the Court held that a judge of an inferior court of a State invested with, and purporting to exercise, federal jurisdiction is not an ' officer of the Commonwealth ' within the meaning and for the purposes of the paragraph.[8] Alternatively, the Court may have considered the District Court to have been *functus officio*, but in view of the attitude of the Court on the point, this is not a strong possibility.[9]

Jurisdictional error

On the first of the two main issues in the case, *viz*, whether the District Court had acted without jurisdiction, the High Court simply held that the finding that the applicant was not exempt under section 29A (1.) was a finding as to the merits of the case and, as no collateral facts were in issue, the Court could not review for jurisdictional error. The Court

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[2] S. 30 provides, *inter alia*—
> . . . the High Court shall have original jurisdiction—
> (a) in all matters arising under the Constitution or involving its interpretation;
> . . . .

[3] *Australian Commonwealth Shipping Board v. Federated Seamen's Union of Australasia* (1925) 36 C.L.R. 442, 450 per Isaacs J.; *Miller v. Haweis* (1907) 5 C.L.R. 89.

[4] *The King v. Bevan*; *Ex parte Elias and Gordon* (1942) 66 C.L.R. 452, 465.

[5] (1966) 40 A.L.J.R. 337, 341.

[6] S. 75 provides, *inter alia*—
> In all matters—
> . . .
> (v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:
> the High Court shall have original jurisdiction.

[7] (1916) 22 C.L.R. 437.

[8] S. 29C (1.) of the Act vests the District Court with federal jurisdiction.

[9] The High Court in the past has been willing to grant prohibition until all possibility of action under the challenged order has ceased: *The King v. Commonwealth Court of Conciliation and Arbitration and the Australian Builders' Labourers' Federation*; *Ex parte Jones* (1914) 18 C.L.R. 224; *The King v. Hickman*; *Ex parte Fox* (1945) 70 C.L.R. 598, 619 in which Dixon J. followed dicta in *The King v. Hibble*; *Ex parte Broken Hill Pty Co. Ltd* (1920) 28 C.L.R. 456.

stressed that it could only review the findings of an inferior tribunal on matters collateral to the merits, as distinguished from matters as to the merits.[10]

While there can be little doubt as to the correctness of the decision on the facts before the Court and on the particular point of law involved, there does appear to be considerable authority which suggests that the High Court could have reviewed the finding of the District Court under section 29A (1.) had it so desired. An incorrect decision on collateral facts is not the only possible ground for establishing jurisdictional error. Judgments in both the High Court and the Privy Council clearly state that if a tribunal takes into account irrelevant matter in reaching its decision then this is jurisdictional error.[11] The following extract from the judgment of Latham C.J. in *The King v. Connell*; *Ex parte Hetton Bellbird Collieries Ltd*[12] would appear to suggest the Court here could have reviewed the decision of the District Court judge that the applicant came within section 29A (2.) and not within section 29A (1.).

> It is therefore well settled that if a statute provides that a power may be exercised if a person is of a particular opinion, such a provision does not mean that the person may act upon such an opinion if it is shown that he has misunderstood the nature of the opinion which he is to form . . . . If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of the power is absent . . . .

Secondly, on the authority of its own judgment in *The Queen v. Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co. Pty Ltd*[13] the Court could have examined the findings of the District Court judge to determine whether he correctly understood the discretion he was to exercise under section 29B (2.). This question was considered in relation to error of law, but here the Court would not have been limited to the face of the record. If such an investigation had shown such a lack of evidence to support the finding (as was alleged) that the judge could not correctly have understood his discretion, then jurisdictional error would have been established.

> The inadequacy of the material is not in itself a ground for prohibition. But it is a circumstance which may support the inference that the tribunal is applying the wrong test or is not in reality satisfied

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[10] Windeyer J. quotes as authority for this, *Estate and Trust Agencies* (1927) *Ltd v. Singapore Improvement Trust* [1937] A.C. 898; *The King v. Connell*; *Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 C.L.R. 407; *The Queen v. Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co. Pty Ltd* (1953) 88 C.L.R. 100; (1966) 40 A.L.J.R. 337, 341. Other authorities are *Colonial Bank of Australasia v. Willan* (1874) L.R. 5 P.C. 417; *Ex parte Wurth*; *Re Tully* (1955) 55 S.R. (N.S.W.) 47.

[11] *The King v. Connell*; *Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 C.L.R. 407; *Estate and Trust Agencies* (1927) *Ltd v. Singapore Improvement Trust* [1937] A.C. 898; *Australasian Scale Co. Ltd v. Commissioner of Taxes* (*Queensland*) (1935) 53 C.L.R. 534, 555 per Rich and Dixon JJ.

[12] (1944) 69 C.L.R. 407, 432.

[13] (1953) 88 C.L.R. 100.

> of the requisite matters. If there are other indications that this is so or that the purpose of the function committed to the tribunal is misconceived it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not exsit in law and in fact.[14]

Error of law on the face of the record

The Court decided unanimously that the District Court's decision disclosed no error of law. One or more members considered each of three situations as being possible errors.

First, the misinterpretation of a legal document, *viz* section 29A (1.) of the Act.[15] It was held by their Honours that the question to be determined had been correctly stated.

Windeyer J. considered the interpretation of ' conscientious belief '[16] and the more detailed definition given[17] could be of considerable importance in later cases. His Honour held further that section 29A (1.) required ' a conscientious and complete pacifism '.[18] In conclusion he warned that section 29B (2.) was not to be used to compromise between granting total exemption and requiring full military service. Section 29A (2.) requires a definite and distinct belief, not simply a belief held with insufficient conviction to bring the applicant within section 29A (1.).

The Court also considered that an incorrect application of facts found by a court to a statutory definition would amount to an error of law.[19] It was held on this point that reading the judgment and evidence as a whole there was no defect in the judge's reasoning.

No consideration was given to the view that if a word is one of common usage its interpretation is a question of fact.[20] However, in the judgment of Windeyer J. there is a hint of the approach advocated by the American writer Professor Jaffe[21]—the question whether certain facts are within a legal definition is a question of law, but the term (in this case, ' conscientious belief ') must be interpreted according to the purpose of the statute.

The final possibility considered was the abuse of discretion, in particular the consideration of irrelevant matter.[22] Windeyer J. held that once again, reading the judgment in the light of all the evidence, no error of law was established.

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[14] *Ibid.* 120 per Dixon C.J., Williams, Webb and Fullagar JJ.

[15] (1966) 40 A.L.J.R. 337 *per* Taylor and Windeyer JJ.; also *Lee v. Showmen's Guild of Great Britain* [1952] 2 Q.B. 329.

[16] S. 29A.

[17] (1966) 40 A.L.J.R. 337, 343.

[18] *Ibid.*

[19] (1966) 40 A.L.J.R. 337 *per* Barwick C.J., McTiernan and Windeyer JJ.; same principle applied in *Farmer v. Cotton's Trustees* [1915] A.C. 922; *Hayes v. Federal Commissioner of Taxation* (1956) 96 C.L.R. 47 ; *Federal Commissioner of Taxation v. Broken Hill South Ltd* (1941) 65 C.L.R. 150.

[20] *Federal Commissioner of Taxation v. Broken Hill South Ltd* (1941) 65 C.L.R. 150.

[21] Jaffe, ' Judicial Review: Question of Law ' (1955) 69 *Harvard Law Review* 239.

[22] (1966) 40 A.L.J.R. 337, 342 *per* Windeyer J.; same principle applied in *Baldwin and Francis Ltd v. Patents Appeal Tribunal* [1959] A.C. 663; *The Queen v. Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 Q.B. 574; *Rex v. Northumberland Compensation Appeal Tribunal* ; *Ex parte Shaw* [1952] 1 K.B. 338.

The modern doctrine of error of law on the face of the record only dates back to *Rex v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw*[23] decided by the English Court of Appeal in 1952. The present case would be one of the first applications to the High Court for *certiorari* to quash for error of law on the face of the record. In view of the early stage of the development of this doctrine as a means of judicial review, it is unfortunate that the High Court chose to follow the House of Lords[24] in refusing to define the ' record '[25] for these purposes. Such reluctance can only increase the uncertainty in an already sufficiently uncertain field.

A second unsatisfactory aspect of the decision on this issue is that it suggests that the High Court may take a somewhat narrower view of what may constitute an error of law than do the English courts. In *Edwards v. Bairstow*[26] Viscount Simonds had this to say on error of law:

> For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained.[27]

In the present case, Menzies J. said:

> Even if the reasoning whereby the court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (*e.g.*, illogical) inference of fact would not disclose an error of law.[28]

It is difficult to see the advantage of restricting the doctrine of error of law at this stage.

Uncertainty of review

This case highlights the uncertainty existing in the field of judicial review of inferior tribunals.[29] It also illustrates the scope of the High Court's discretion in deciding whether it will review or not, and while this flexibility undoubtedly has its advantages, it also makes the practitioner's task in advising clients a difficult one.

In conclusion it would seem that the case is authority for at least this: the Court will rarely find that it has jurisdiction to review in a case which it considers the tribunal has decided correctly.

J. W. CONSTANCE

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[23] [1952] 1 K.B. 338.

[24] In *Baldwin and Francis Ltd v. Patents Appeal Tribunal* [1959] A.C. 663.

[25] The Court in the present case assumed the record included a transcript of the oral judgment given in the court below and the reasons for it.

[26] [1956] A.C. 14.

[27] *Ibid.* 29; 36 *per* Lord Radcliffe ; the decision was applied in *Griffiths v. J.P. Harrison (Watford) Ltd* [1963] A.C. 1.

[28] (1966) 40 A.L.J.R. 337, 340-341.

[29] Whitmore, ' O ! That Way Madness Lies: Judicial Review for Error of Law ' (1967) 2 *Federal Law Review* 159.